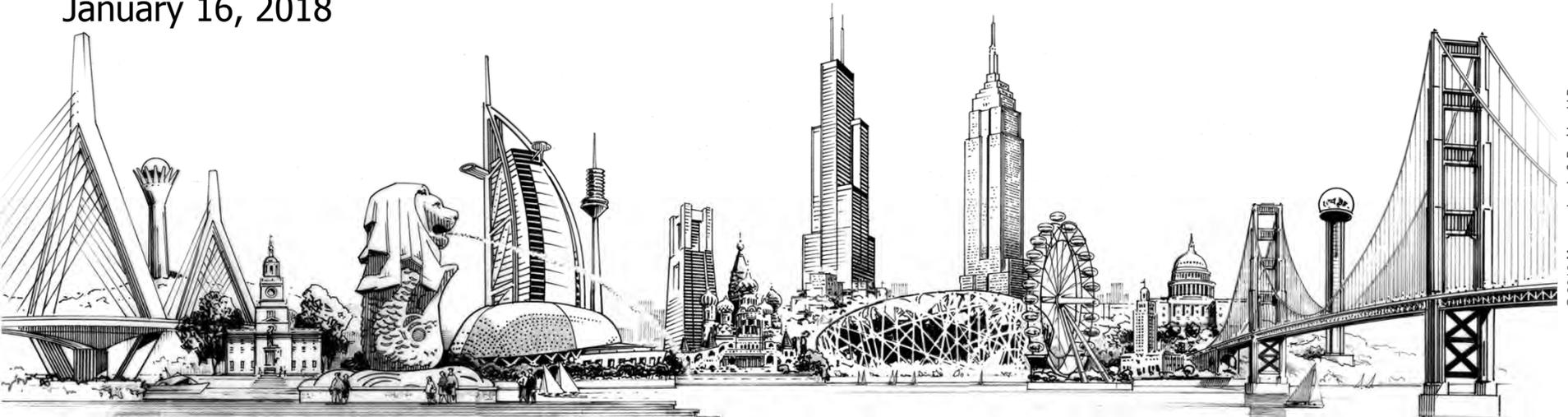


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EMPLOYMENT & COMPLIANCE ISSUES & PITFALLS IN CROSS- BORDER M&A TRANSACTIONS

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Agenda

- Key Compliance and Employment Risks in International M&A
- Successor Liability – Stock vs Asset Deal
- Risk-based compliance due diligence
- Risk-based employment due diligence
- Special contract provisions addressing compliance and employment risks
- Considerations for Sellers
- Considerations for Buyers

Key Compliance Risks in International M&A

- Anti-corruption law (FCPA, UKBA and local anti-corruption laws)
- Sanctions laws
- Export control
- Customs/ import compliance
- Data protection
- National security interests
- Anti-money laundering
- Antitrust

Key Employment Risks in International M&A

- Labor disputes / government investigation issues
- Labor union issues, strikes, lock-outs, slowdowns, unionization etc.
- Employee benefits and tax issues: social insurance, overtime – unfunded or underfunded issues
- Non-compete / non-disclosure agreements, invention / IP assignment agreements
- Misclassification issues: employee vs independent contractor
- Immigration issues
- Turnover / retention issues
- Termination issues

Successor Liability - Stock v. Asset Transaction

Compliance Considerations

- Stock transaction
 - Clear precedent establishing liability of the buyer for misconduct of the target company before closing
 - FCPA - avoid / minimize buyer's (but not target's) liability by risk-based due diligence, DOJ opinion release, voluntary disclosure and / or timely remediation
- Asset transaction
 - General Rule: No successor liability
 - Exception: De facto merger / continuity of enterprise

Stock v. Asset Transaction

Employment Considerations

- Stock transaction
 - Buyer gets everything, the good and the bad
- Asset transaction
 - General Rule: Seller's liabilities and restructuring costs more likely stay with seller
 - Exception: Buyer may be liable if court determines it is "fair and necessary" in the totality of the circumstances
 - Continuity in operation and workforce
 - Ability of predecessor to provide relief to the alleged victims

Risk-based compliance and HR due diligence

Difference of approaches:

- Government enforcement cases / internal compliance investigation vs. due diligence in M&A
- High risk vs. low risk country / industry
- Desk-top review of data room vs. interview of target personnel vs. forensic audit

Risk-based compliance due diligence

Key Diligence Questions

- Does the target operate in a high-risk country or industry?
- Does the target have extensive international sales, foreign subsidiaries or many points of contact with foreign government officials or state-owned enterprises?
- Does the target rely on use of third party intermediaries to make sales or handle government relations? Are third parties easily identified in the target's records and accounting systems?
- Does the target rely on business gifts, travel, entertainment, and donations as part of its sales and marketing?
- How strong is the target's compliance program and culture? If the target has no program, how strong are its accounting controls and business processes?
- How cooperative and transparent is the target in the diligence process?
- Does the target have ongoing or past internal or government investigations or reported violations?
- Does the target have export license or are such licenses required?
- Does the target conduct business in any countries subject to US sanctions or screen against the OFAC SDN or other blocked person lists?
- Does the target conduct business in any boycotting countries?
- Is the target's business dependent upon imports and are such imports subject to US customs and border protection audit or trade remedies / actions?

Risk-based compliance due diligence

Isolated incident or tip of the iceberg?

1. How much of the target's revenue stream/business model could be affected?
2. How many key employees, intermediaries, or customers may be affected or need to be retrained or terminated?
3. Is the target's business model/culture so different that it will be difficult to integrate it into your compliance program without the business being materially affected?
4. How much uncertainty is there concerning whether you have had sufficient time to assess compliance risks or to resolve known compliance issues and quantify associated costs and liability?
5. Can identified risks be addressed through contractual provisions or revaluation? Or are they so serious that they should be resolved prior to closing?

Risk-based employment due diligence

Issues to consider:

- Is employment roster in order?
- Is employment documentation in order?
 - Contracts, policies, work authorization, consents, etc.
- Compliance with social benefits and taxes?
- Relatively stable employee population, or high volume of labor issues and litigation?
- Average tenure of workforce?
- Transparency of pay practices?
 - Overtime, allowances, bonuses, in-kind benefits, etc.

Risk-based compliance and HR due diligence

Once the risk-based compliance and HR due diligence is concluded, assess the effect of the findings on the overall transaction:

Options include:

- (a) proceeding as planned or renegotiating to account for risks,
- (b) delaying closing until further due diligence is done or active cases/investigations are resolved and then reassessing or renegotiating, or
- (c) walking away.

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Special contract provisions

- Include specialized representations and warranties in transactional documents
- Don't rely on general compliance with laws representations and warranties, which are often qualified with no material adverse effect language
- Specialized representations and warranties serve two purposes:
 1. force disclosure of compliance issues, and
 2. in private company transactions where representations and warranties survive the closing, set up special indemnities, which may be secured by special escrow

Considerations for Sellers

Sellers should consider the following with respect to international compliance issues:

1. Prepare due diligence for buyers by doing a self-assessment of ongoing compliance issues, including hotline complaints, internal investigations, or external enforcement cases.
2. Prepare any required disclosure information and determine at what time and in what manner to disclose it to buyers.
3. Be prepared for a discussion with buyers concerning the potential materiality of international compliance issues in terms of purchase price adjustments in public deals where representations, warranties and indemnities do not survive the closing or special escrows in private deals where they do.
4. Be prepared for a requirement by buyers that the international compliance issues be disclosed to enforcement authorities as a condition of closing.

Considerations for Buyers

Buyers should consider the following with respect to international compliance issues:

1. Prepare due diligence plan and allow for adequate time where possible; do not let the sellers delay disclosure until the 11th hour.
2. Adjust the due diligence plan and resources depending upon what is learned.
3. Discuss with sellers and buyers' own counsel potential materiality of international compliance issues and level of uncertainty.
4. Consider international compliance representation and warranty insurance products.
5. Consider adequacy of proposed special escrows in private deals where issues have been identified.
6. Consider whether forcing disclosure to enforcement authorities will lead to timely resolution of international compliance issues before closing.
7. Prepare pre-acquisition the post-acquisition international compliance integration plan.
8. If the target is a public company, consider SEC disclosure obligations and potential issues relating to material weaknesses in internal controls.

Biography



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Todd Liao works with clients on a wide range of financial transactions and legal issues involving China. He frequently works with multinational corporations on cross-border mergers and acquisitions, foreign direct investment and investment financing, disposal of Sino-foreign joint ventures and assets, and the structuring of complex commercial transactions. In addition, Todd counsels on matters related to the US Foreign Corrupt Practices Act (FCPA) practice in China and throughout the Asia-Pacific region. He is admitted to practice in New York only.

Biography



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K. Lesli Ligorner serves clients on a wide range of labor and employment matters involving hiring and termination, establishment and enforcement of company policies, the Foreign Corrupt Practices Act (FCPA) and local anticorruption compliance, and discrimination and harassment policies, training, and investigations. She also advises on global mobility and immigration, employment and anticorruption due diligence in mergers and acquisitions, leaves of absence, wage and hour laws, intellectual property protection, and unionization and collective bargaining.

Questions

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